

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

77-6119

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-6119

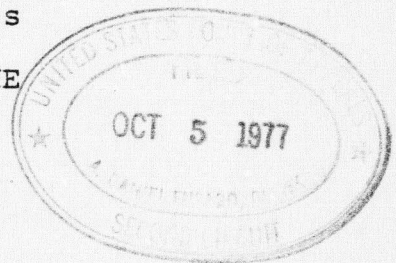
BERALDINE L. ACHA and ARLENE M. EGAN, each
individually and on behalf of all others
similarly situated,

Plaintiffs-Appellants,

against

ABRAHAM D. BEAME, individually and in his
capacity as Mayor of the City of New York,
MICHAEL J. CODD, individually and in his
capacity as Police Commissioner of the
New York City Police Department, and THE
CITY OF NEW YORK, as a public employer,

Defendants-Appellees.



On Appeal from the
United States District Court for the
Southern District of New York

BRIEF OF THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICUS CURIAE

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STATEMENT OF INTEREST

The Equal Employment Opportunity Commission is
the agency charged by Congress with the administra-
tion, interpretation, and enforcement of Title VII
of the Civil Rights Act of 1964, 42 U.S.C. §2000e,

et seq. The Supreme Court has recently handed down two decisions of great significance for the interpretation and enforcement of Title VII. International Brotherhood of Teamsters v. United States, ___ U.S. ___, 97 S.Ct. 1843 (1977), and United Airlines, Inc. v. Evans, ___ U.S. ___, 97 S.Ct. 1885 (1977). This appeal may involve the interpretation and application of those decisions in factual circumstances where private plaintiffs challenge the continued maintenance of a discriminatory policy. A decision by this Court addressing such issues would significantly affect the enforcement of Title VII. Therefore the Commission believes it important to present its views to the Court on these issues.

ISSUES PRESENTED

1. Whether plaintiffs in this case may recover relief for injuries suffered by defendants' hiring practices, regardless of whether an incident of hiring discrimination occurred within 300 days of their EEOC charges, if they can show that defendants' hiring practices were part of a policy of limiting opportunities for women to serve as patrolmen, and they suffered injury due to that policy within the

charge-filing period.

2. Whether the district court properly limited plaintiffs' relief to injuries occurring after 1972, where it is clear that defendants' prior conduct was unlawful at the time it occurred.

STATEMENT OF THE CASE

This is an appeal from an order entered July 28, 1977 by the United States District Court for the Southern District of New York, vacating prior judgments in favor of plaintiffs-appellants which had provided them permanent injunctive relief and denying preliminary injunctions to certain class members.

This order was entered in a class action filed in June 26, 1975, by Beraldine L. Acha and Arlene M Egan alleging that layoffs of June 30, 1975, of themselves and others similarly situated from their employment as New York City policewomen, violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., the Fourteenth Amendment, and 42 U.S.C. §1983, because the policies under which the layoffs were carried out resulted in the disproportionate termination of female employees. The Title VII claims were based in charges filed with the EEOC by Beraldine Acha and Arlene Agan on June 25, 1975.^{1/} (A. 172-179)

This Court, in an opinion dated February 19, 1976,

^{1/} A second amended complaint was filed on August 29, 1977 alleging a charge filed by Alice McCain in September, 1973 and the issuance of a right-to-sue notice on that charge.

reversed the district court's dismissal of the suit, finding that plaintiffs' complaint stated a cause of action^{2/} and remanded for further proceedings. 531 F.2d 648. It directed the district court to determine which class members "would have been hired early enough to obtain sufficient seniority to avoid layoff had it not been for defendants' discriminatory practices." Id. at 656. Because of its disposition of the Title VII claims, the Court found it unnecessary to rule on plaintiffs' claims under §1983 and the Fourteenth Amendment. Id. at 656. n.15.

On remand the district court, on August 4, 1976, granted partial summary judgment in favor of 38 members of the class and entered an injunction prohibiting the Police Department from rehiring from a seniority roster which did not reflect the proper seniority status of these class members. (A. 312-318) The district court also appointed a special Master to hear the claim of the other class members and denied defendants' cross-motion for summary judgment. (Id.)

2/ "If a female police officer can show that, except for her sex, she would have been hired early enough to accumulate sufficient seniority to withstand the current layoffs, then her layoff violates section 703 (a)(1) of Title VII, 42 U.S. C. §2000e-2(a)(1), since it is based on sexual discrimination." 531 F.2d at 654.

The partial summary judgment having been certified a final judgment pursuant to Rule 54(b), Fed.R. Civ. P., (A. 310), the defendants filed a notice of appeal from that portion of the August 4th judgment concerning the adjusted seniority dates of the 38 class members. (A. 1319) That appeal was subsequently dismissed by this Court because of defendants' failure to docket their appeal. (A. 322)

On March 28, 1977, following extensive hearings before the Special Master and review by the district court of the first two of the Master's interim reports, the court entered an order and judgment establishing revised seniority dates for 34 additional class members and enjoined defendants from any rehiring which did not reflect the proper seniority status of those class members. (A. 465-475) Subsequently, the Special Master found 11 additional class members entitled to revised seniority dates. The district court had not yet entered an order concerning the claims of these 11 class members as of the time the order currently under appeal was entered.

On June 15, 1977, defendants moved pursuant to Rules 56 and 60, F.R.Civ.P., to renew their previously denied

cross-motion for summary judgment and to be relieved from the August 4, 1976 judgment and all subsequent judgments. (A. 478) Defendants contended that intervening Supreme Court decisions--Teamsters v. United States, ___ U.S. ___, 97 S.Ct. 1843 (1977) and United Air Lines v. Evans, ___ U.S. ___, 97 S.Ct. 1885 (1977)--required that judgment be entered in favor of defendants dismissing the action. (A. 481)

The district court denied the defendants' cross-motion for summary judgment but vacated the earlier orders entered in favor of 72 members of the class. It revoked the permanent injunctions affecting them but maintained the provisions of the injunctions as preliminary injunctions pending final resolution of their Title VII and §1983 claims. It further denied preliminary injunctive relief for the 11 class members whose claims had been determined by the Special Master but which had not yet been finally determined by the court.^{3/} (A. 603)

^{3/} The district court did, however, confirm the Factual findings of the Special Master in the Third, Fourth, and Fifth Interim Reports concerning the claims of the class members, but remanded them to the Special Master "for new findings and conclusions consistent with this opinion."
(A. 603)

The district court held that it had the authority "to relieve a party from a final judgment" pursuant to Rule 60(b)(1), (5) or (6), and that such relief was proper because it would be inequitable for the first 38 reinstated class members to be unaffected by the later Supreme Court decisions while those reinstated later would be affected. (A. 588-589)

As to the timeliness of the Title VII claims, the court held that with respect to the hiring practices, a claim was timely only if, within the 300 days prior to the June 25, 1975 charges of Acha and Egan, a male police officer had been hired instead of a female who met all appointment requirements and had a higher test score. (A. 590-591) The district court refused to rule on the effect on the timeliness of plaintiffs' claims of a newly-discovered charge which had been filed with the EEOC on September 11, 1973, by a class member, Alice McCain. (A. 591-592)

The court ruled that the June 1975 layoffs pursuant to a facially neutral seniority system could not be the basis of Title VII violation. (A. 584) Any class member who could establish that she was not hired until after March 24, 1972, and that, but for her sex, she would have been hired earlier than her actual appoint-

ment date, would be entitled to relief. (A. 594-595)
But any remedial revision of her seniority date could not pre-date March 24, 1972. (A. 595)

The district court set forth principles for litigating the alleged §1983 claims as well. It ruled, that for the claims to be timely, the plaintiffs must prove that discriminatory acts occurred within the three years preceding filing of the action. That is, with respect to hiring, class members not hired until after June 1972 could attempt to prove that a male was hired in the place of a qualified female with a higher test score. (A. 596) Plaintiffs could also attempt to prove that the layoffs violated §1983, but could not do so by "attempt[ing] to 'bootstrap' a challenge to a pre-June 26, 1972 hiring practice simply by alleging that the effects of the earlier discrimination lingered until layoff." (Id.) In order to show a violation of §1983, the district court ruled, the plaintiffs must prove that defendants treated men and women differently "without substantial justification" and with "a discriminatory interest or purpose. . . [as] a motivating factor." (A. 599)

STATEMENT OF FACTS

It is undisputed that at least until mid-1973, the defendants maintained separate job categories with different duties for men and women and limited the total number of women appointed to the Police Department to approximately 2% of total personnel. (E.g., A. 485) Women were appointed only to the positions of Patrolman or Police Trainee. In order to be appointed to the Police Department, a woman must have attained the minimum age of 21 years. A male who was under the age of 21 years, but at least 17 years old, could be appointed Police Trainee; became a Patrolman upon attaining the age of 21 years; but retained as his seniority date for layoff purposes his original date of appointment to the Department as Police Trainee.

Appointments to the positions of Policewoman, Patrolman and Police Trainee were made from ranked lists of eligible individuals derived from the results of examinations given for the particular positions. Prior to December 1973, separate examinations were given for the positions of Policewoman, Patrolman and Police Trainee, and women were not permitted to take

the examination for Patrolman and Police Trainee.^{4/}
Exams for the Policewoman position were given only twice prior to 1973: one exam on March 21, 1964, and another on October 25, 1969. During the same time period--March 21, 1964 to October 25, 1969--nineteen exams were given for men interested in Patrolman and/or Police Trainee positions. (Id.)

On October 25, 1969, two separate examinations were given for Police Trainee/Patrolman (Exam No. 9080) and Policewoman (Exam No. 9081). While the two exams consisted of the same questions and were graded in the same manner, they were announced and administered separately. Separate eligibility lists for the Trainee/Patrolman and Policewoman positions were established from the results of the two exams. Exam No. 9080 was open only to men who were not less than 16 years of age on the date of the written exam and 17 years of age on the date of appointment. From this examination, a single list was established with appointments to be made to either Patrolman or Police Trainee, depending on the man's age. Exam No. 9081 was given only to

4/ See announcements of, for example, Exam Nos. 8046 and 9080 for Patrolman/Police Trainee in which the first line reads "this examination is open only to men." (A. 162, 209)

women not less than 19 years of age on the date of the examination. There was no provision for examination and appointment of women between the ages of 16 and 21 to trainee positions. (A. 525)

From approximately February 1970 through the end of 1972, there was a freeze on hiring by the Police Department. Therefore defendants made no direct appointments from eligibility lists to Patrolman or Policewoman positions. However, on May 9, 1970, defendants appointed 125 men who had passed Exam No. 9080 with a score of 84 or better to be Police Trainee. Most of these 125 men were appointed as Patrolman during the freeze upon reaching the requisite age.

Appointments to Patrolman and Policewoman recommenced in January 1973 when the freeze was lifted. These appointments were made from the sex-segregated lists resulting from the preceding sex-segregated examinations. During 1973, women were appointed from the single list resulting from Exam No. 9081, while men were appointed from lists derived from at least seven different exams given in 1968, 1969, 1970. (A. 548, 573-575) Defendants continued to make appointments from these sex-segregated lists through

September 1974, until a new hiring freeze was instituted in October 1974. (A. 486, 530) Appointments from these lists resulted in the appointment of approximately 2323 men and 478 women in 1973. Further appointments from the sex-segregated exams and the first "unisex" exams (which had been administered in December 1973) resulted in 4,236 men and 513 women being appointed between January 1973 and October 1974. (A. 576)

In April 1973, the Police Department consolidated the Patrolman and Policewoman titles into the title, "Police Officer" for some purposes. The extent of the consolidation of the formerly separate titles remains in dispute. While the defendants contend that all differences were eliminated (A. 541), the plaintiffs submitted material indicating that women continued to be restricted in the variety of job assignments available to them, and that the Police Department continued to maintain the two titles separately for budgetary purposes. (A. 572-573, 580, 581) An investigation by the New York City Commission on Human Rights dated April 8, 1977 showed that women were

assigned to only 10 of the 73 precincts and did not have steady tours of duty; consequently, they were prevented from performing numerous duties and were deprived of experience, training and promotional opportunities equivalent to those of their male counterparts. (A. 533; Exhibit D to Plaintiffs' Memorandum of Law, file July 8, 1977).

A member of the class, Maureen Kempton, stated in an affidavit that, until her layoff on June 20, 1975, her ability to bid against her male colleagues for assignments and vacations was restricted by the Borough office which regulated the assignments and vacations of all the women, but not the men. (A. 537) She also indicates that since her reinstatement on March 31, 1977, she has only been permitted to bid for her vacations against other women. (A. 537-538) Ms. Kempton was not issued an identification card identifying her as a Police Officer until May 1975, shortly before she was notified she was to be laid off. The identification card listing her as "Police Woman" was issued her at the time of her appointment of May 29, 1973, a month after the separate titles were allegedly consolidated.^{5/} (A. 536)

^{5/} Defendants explain the issuance of identification cards stating "Police Woman" and the delay in issuing new cards stating "Police Officer" as the result of various administrative difficulties. (A. 551)

Finally, the sections of the Administrative Code of New York, Sections 434a-1.0, 2.0, establishing separate Patrolman and Policewoman titles with separate duties remain unchanged.

At the end of 1974, the possibility of layoffs pursuant to New York Civil Service Law §80(1) was first considered. (A. 486) Section 80(1) requires that layoffs for economic reasons be made "among incumbents holding the same or similar positions. . . in the inverse order of original appointment. . .". The defendants carried out the layoffs pursuant to a single merged seniority list of all men and women in the Police Department rather than pursuant to separate lists for those appointed as Policewomen and those appointed as Patrolmen, even though almost all the appointments of the women on the merged layoff list had been made from the separate Policewoman list, and almost all the appointments of men had been from a separate Patrolman list. (A. 531-532) This merged-list layoff procedure resulted in the layoffs of approximately 60% of the women and less than 20% of the men in the Police Department. Although the total

percentage of women in the Department had increased to 2.62% just prior to the layoffs it decreased to 1.34% as of July 10, 1975--the same percentage as prior to the 1973 hirings.

Pursuant to the proceedings in this case, 61 of the class members who have proved that they would have been hired earlier than their actual appointment date, had the defendants not discriminated against women in their hiring practices, had been rehired as of April 11, 1977.

ARGUMENT

I. THE DISTRICT COURT SHOULD NOT HAVE CONCLUDED THAT PLAINTIFFS' ABILITY TO OBTAIN RELIEF FOR DEFENDANTS' HIRING PRACTICES DEPENDS ON WHETHER THEY CAN SHOW THAT AN INCIDENT OF HIRING DISCRIMINATION OCCURRED WITHIN 300 DAYS OF THE RELEVANT CHARGE; PLAINTIFFS MUST BE ALLOWED TO SHOW THAT THE HIRING PRACTICES WERE PART OF A POLICY OF LIMITING OPPORTUNITIES FOR WOMEN TO SERVE AS PATROLMEN WHICH WAS MAINTAINED WITHIN 300 DAYS OF THE CHARGE.

A. Introduction

The district court in this case took the extraordinary step of reopening under Rule 60(b) a final order which had determined the rights of certain class members in this action, largely because of its view as to the impact of International Brotherhood of Teamsters v. United States, __U.S.__, 97 S.Ct. 1843 (1977), and United Air Lines, Inc. v. Evans, __U.S.__, 97 S.Ct. 1885 (1977), on this case. In so doing, the district court appears to have misunderstood the nature of the violations involved here and, as a consequence, misconstrued the impact of Teamsters and Evans to cases of this kind.

This appeal directly presents two issues: 1) whether it was proper under Rule 60(b) to reopen a final decree which had adjudicated the seniority status of some of the persons in the class plaintiffs represent; and 2) whether it was proper for the district court to deny preliminary injunctive relief concerning the seniority

status to be accorded several additional class members.^{6/}

The resolution of both these issues may require the proper interpretation of the principles set forth in Teamsters and Evans as applied to the practices at issue here.^{7/} The district court has apparently held

^{6/} The district court expressly reserved the question as to whether the 1973 charge filed by class member McCain could serve as the basis for a challenge to the hiring practices at issue herein. (A. 592) Resolution of that issue in plaintiffs' favor would render unnecessary consideration of whether plaintiffs can recover for injury suffered as a result of those practices under any other theory.

The district court also reserved the question of whether defendants had violated 42 U.S.C. §1983 in any manner. (A. 599) As discussed below, resolution of that issue in plaintiffs' favor would affect the district court's ruling that plaintiffs are not entitled to recover relief for harm suffered prior to 1972.

^{7/} The district court, however, resolved the preliminary injunction issue solely on its assessment of the nature of the harm threatening plaintiffs and without reference to their probability of success under Teamsters and Evans.

The Rule 60(b) issue might also be resolved without reference to Teamsters and Evans. There are powerful arguments that, whatever impact those cases might have on the rights of other class members, it is inappropriate under Rule 60(b) to reopen the seniority status of those class members whose rights have been finally adjudicated.

In order for relief from a judgment to be granted under Rule 60(b)(5), the moving party must establish that circumstances have changed to such an extent that continued enforcement of the injunction would be inequitable. E.g., United States v. Swift & Co., 286 U.S. 106 (1931); Schildhaus v. Moe, 335 F.2d 529 (2d Cir. 1964). Defendants have the burden of demonstrating that the relief previously granted "has been turned through changing circumstances into an instrument of wrong." United States v. Swift & Co., *supra*, 286 U.S. at 115. The defendants here have not met this burden.

(Footnote continued next page)

that, under those decisions, plaintiffs in this case cannot obtain relief for the harm that they, or members of the class, suffered for the period during which they were discriminatorily denied hire unless they can show that they timely challenged an individual instance of hiring discrimination.^{8/} In our view, this constitutes an improper interpretation of Teamsters and Evans as applied to the practices at issue here.

7/ Footnote continued

Indeed, it seems clearly inequitable to deprive those class members who have received the right to a revised seniority date, pursuant to a decree which has become final, and who have been reinstated to their jobs in accordance therewith, of their rights under the decree. In Teamsters itself, the Court recognized that it may be inequitable to deprive individuals of established seniority rights--even when those rights are grounded only in contract, and even though affecting those rights may be necessary to provide full relief for a violation of the law. 97 S.Ct. at 1873-75. Surely it would be far more inequitable to deprive individuals of seniority rights grounded in a fully litigated final decree, particularly where no reason can be advanced as compelling as the need to remedy unlawful conduct. And certainly, if the result of adjusting the seniority status of those who have received a final determination is to deprive them of their present positions, equity will not countenance that result. Compare those cases holding that even the most compelling equitable claims cannot ordinarily serve as the basis for depriving incumbents of their present jobs. E.g., Patterson v. American Tobacco Co., 535 F.2d 257, 267-68 (4th Cir.), cert. denied, 429 U.S. 888 (1976); Local 189, Papermakers and Paperworkers v. United States, 416 F.2d 980, 988 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).

8/ The district court did not expressly so hold, stating only that: "[P]laintiffs...must establish...a Title VII violation which occurred...within the statute of limitations." (A. 594, emphasis supplied). In the next sentence, however, the court stated: "Thereafter any class member who was not hired until after March 24, 1972...[may be] entitled to a

(Footnote continued)

As shown below, under Title VII, an individual who timely challenges one occurrence of a continuously maintained discriminatory employment policy may secure relief for other injuries caused by the same policy even if those injuries occurred more than 300 days prior to the charge. Nothing in Teamsters or Evans affects this principle, which is compelled by the express terms of the statute. Therefore, if plaintiffs can show that the defendants have continuously maintained a policy of limiting women's opportunities to serve as patrolmen, and that the defendants' hiring, job segregation, and layoff practices were all manifestations of this policy, they can obtain full relief for all harm they have suffered as a result of that policy, so long as any manifestation thereof occurred within 300 days of their charge. Thus, if the lay offs--which clearly occurred within 300 days of the Acha and Egan charges--are shown to be part of such a continuously maintained policy, plaintiffs can also obtain relief for the harm they suffered during the period when defendants simply

8/ Footnote continued
seniority revision." (A. 594-95, emphasis supplied). Therefore, it appears that, in the district court's view, the rights of plaintiffs to obtain seniority relief back to 1972 depends entirely upon their proof of a timely charged hiring violation. The court defined the hiring violations at issue here as occurring "when a male police officer is hired instead of a female who meets all the requirements for appointment and has a higher test score." (A. 590-91).

refused to hire them for patrolmen positions, regardless of whether any specific hiring decision occurred within 300 days prior to the charge. Similarly, if plaintiffs can establish (as they have produced some evidence to show) that, as a continuance of their prior policy, defendants until at least 1976 were still preventing women from serving as patrolmen on the same basis of men, they can also obtain relief from the earlier harm caused by the same policy in hiring. Because the resolution of the issues presented on this appeal may involve interpreting Teamsters and Evans as applied to the practices involved in this case, and because the district court's apparently erroneous interpretation of those decisions may govern further proceedings herein, we believe it important to point out the error in that interpretation.

B. Under Title VII, If An Injury Resulting From A Continuously Maintained Unlawful Policy Is Timely Charged, Relief May Be Had For Injuries Suffered By Reason Of The Same Policy, Even Though Such Injuries Occurred More Than 300 Days Prior To The Filing Of The Charge.

In amending Title VII in 1972, Congress made it very clear that an individual need not challenge the continued maintenance of an unlawful policy when first injured thereby, but could challenge the maintenance of such a policy at any time that it caused an injury. In amending the time periods in which charges must be filed under Title VII, Congress specifically recognized that some violations are continuing in nature, and stated that, with respect to such violations, the period for filing charges runs "from the last occurrence of the discrimination, and not from the first...." Section-by-Section Analysis of H.R. 1746, 118 Cong. Rec. 7565 (March 6, 1972); see also 118 Cong. Rec. 7167 (March 8, 1972).^{9/} Congress made it equally clear that, where such a continuing practice is timely challenged, relief can be obtained for injuries resulting therefrom which occurred more than 300 days prior to the filing of the charge. Hence Section 706(g), 42 U.S.C. 2000e-5(g), specifically provides that back pay may be recovered under the Title for a period of two years prior to the filing of a charge challenging the practice involved. And th

^{9/} Reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. at 1846. (GPO, 1972)

legislative history of the provision leaves no doubt that Congress made a deliberate choice to permit individuals who had timely challenged an injury resulting from an unlawful practice to recover even back pay relief for additional injuries caused thereby, regardless of whether such particular injuries had themselves been timely challenged.^{10/}

^{10/} The two year provision arose from an amendment to the House Bill, H.R. 1746, introduced by Congressman Erlenborn which would have limited back pay recovery to a period of 2 years prior to the filing of a judicial complaint. In introducing that amendment the Congressman stated that the 2 year provision was directed only to actions brought by the government, since "with respect to individual complainants...back pay and other liability is limited to the statutory period for filing [charges], formerly 90 days and extended under this bill to 180 days." Legislative History, p. 249. This amendment was incorporated into the bill which was enacted by the House on September 16, 1971. Legislative History, p. 332. The Senate Bill as introduced, contained no limit on back pay recovery. Legislative History, pp. 157, 165. After hearing testimony from, inter alia, Congressman Erlenborn (Id., p. 412), the Senate Committee adopted a limitation on back pay in which recovery would be limited to 2 years prior to the filing of a charge with the EEOC. The Senate Report made it clear that this limit would apply to "any situation involving back pay..." Senate Report, supra, p. 20; Legislative History, p. 429. The Senate Bill containing this limitation passed. Legislative History, p. 383. The Senate limitation prevailed in conference. Legislative History, p. 1817.

Thus it is clear that an individual need not challenge a continuing policy of segregating male and female jobs at the time she is hired into a female position, but may do so as long as the policy of segregating those jobs continues in effect. Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 247 (3rd Cir.), cert. denied, 421 U.S. 1011 (1975). Furthermore, an individual who timely challenges the maintenance of a policy restricting her opportunities to obtain desirable positions may recover relief for specific injuries which have resulted from that policy, even though those specific injuries were not themselves incurred during the limitations period. Rich v. Martin Marietta Corp., 522 F.2d 333, 348 (10th Cir. 1975).

There is nothing in Teamsters and Evans which calls into question these principles. Teamsters recognizes that certain violations are continuing in nature, but did not present the question of whether relief for such violations could include redress for injuries suffered prior to the charge-filing period. In Evans there was no timely charged violation, and therefore the Court did not address any issue of relief.

In Teamsters the Court recognized that the policy of excluding blacks from over-the-road positions constituted a continuing violation. The Court held that blacks who had applied for such positions, but had not done so since the effective date of Title VII, were eligible for relief.^{11/} But the Court also held that blacks "who suffered only pre-Act discrimination are not entitled to relief...." 97 S.Ct. at 1865. Therefore pre-1965 black applicants were entitled to relief only because the defendant's exclusionary policy--manifested in both its hiring and transfer practices^{12/}--was viewed as a continuing violation. The Court viewed it as such because of its recognition that the very maintenance of such a policy tended to deter blacks from applying for road driving positions. 97 S.Ct. at 1869-1870. The policy therefore was seen as capable of causing injury, not just when initially encountered, nor only until a black was hired into a city driving job,^{13/}

^{11/} Thus "the most convincing proof" that an individual with no post-Act application would nevertheless be entitled to relief "would be...a pre-Act application...." 97 S.Ct. at 1873, n. 58.

^{12/} 97 S.Ct. at 1868, n. 49.

^{13/} Thus the Court specifically noted that its discussion of non-applicants included "Employees who initially applied for line driver jobs and were hired in other jobs before the effective date of the Act, and who did not later apply for transfer...." 97 S.Ct. at 1868, n. 49.

but as long as the policy was maintained in effect.

Although Teamsters does recognize continuing violations of Title VII, it did not involve the issue of whether, where such a violation is timely challenged, relief may be obtained for injuries caused thereby prior to the charge-filing period. This was because the action was brought by the United States under Section 707 of Title VII which, at the time of suit, contained no limitations period. Thus there was "no claim that any relief would be time-barred." 97 S.Ct. at 1861, n. 30.

Nor does Evans address the issue, for it holds only that there was no timely charged discriminatory practice in that case. The plaintiff's allegedly discriminatory discharge had not been timely challenged. The Court held that the fact that her present seniority status had been affected by that discharge was not sufficient, standing alone, to constitute a present violation^{14/}. She had alleged no other discrimination subsequent to the discharge. Thus the Court held that she "did not file a timely charge based on her 1968 separation and she has not alleged facts establishing a violation since she was rehired...." 97 S.Ct. at 1889. Consequently, the Court stated: "we do not reach any

^{14/} "[A] challenge to a neutral seniority system may not be predicated on the mere fact that a past event which has

remedy issue...." ^{15/} Id.

As discussed more fully below, the plaintiffs in this case, unlike the plaintiff in Evans, allege a pattern of discriminatory conduct, some parts of which continued into, and even beyond, the limitations period. Therefore Evans does not prevent them from maintaining this action. See Caldwell v. Seaboard Coastline R.R., __F.Supp. __, 15 FEP Cases 428, 429-30 (W.D. N.C. 1977). Furthermore, as the provisions of the statute itself make clear, the plaintiffs herein can recover for injuries which occurred prior to the charge-filing period (stemming, for example, from refusal to hire, or denial of patrolman assignments) if they can show that those injuries resulted from the continued maintenance of the same exclusionary policy as did those (e.g., the alleged continued denial of patrolman assignments, on the same basis as men or the layoffs) which were incurred within 300 days of the charge.

14/ Footnote continued
no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim" 97 S.Ct. at 1890 (emphasis supplied)

15/ The Court does state at one point that "A discriminatory act which is not made the basis of a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed," 97 S.Ct. at 1889. The court is careful to add, however, that "separately considered" such an act "has no present legal consequences". Id.

C. Since Plaintiffs May Establish That Defendants' Hiring Practices Resulted From A Policy of Limiting Opportunities Available For Women To Serve as Patrolmen, They Need Not Prove That Incidents of Hiring Discrimination Occurred Within The Charge-Filing Period In Order To Recover For the Hiring Discrimination.

Plaintiffs herein may well establish that defendants, have continuously maintained a policy of limiting the opportunities women have to serve as patrolman until well after the charge-filing period. They have described a course of conduct, allegedly extending even into the present, each element of which shares the common characteristic of consistently disadvantaging women.

Until at least mid-1973--more than a year after Title VII became applicable to public employers--defendants maintained an absolutely sex-segregated job classification system. While men were employed to perform a wide variety of duties as Patrolmen, women were restricted to a limited number of specialized functions involving "the treatment of apprehended females and juveniles" and "specialized investigative assignments requiring the use of fe-

males."^{16/}(A. 270) The number of women employed by the Police Department was restricted to less than 2% of total personnel. (531 F.2d at 649; A. 270)

Plaintiffs contend that, although the separate job titles of Patrolman and Policewoman were purportedly eliminated and one title, Police Officer, created in mid-1973, many--if not most--of the former manifestations of the defendants' practice of treating women differently than men were continued, even to the present. An investigative report of the New York City Commission on Human Rights, prepared in April 1977, concerning a charge filed in July 1976, indicates that women, unlike men, have been involuntarily assigned to only 10 of the 73 precincts and refused permanent tours of duty because of their sex, seriously undermining their ability to gain the same experience and training as men and therefore also restricting their promotional opportunities. Women continued

16/ The New York City Administrative Code, Section 434a-2.0 provides that women police officers shall be employed "for the increased moral protection of women and minors, for the prevention of delinquency among such women and minors, and for the performance of such other duties as he [the police commissioner] may assign to them."

to be restricted in the use of their seniority for bidding on vacations. Unlike men, they were required to compete only with other women in vacation selection. (A. 5637-538) This practice admittedly resulted from the underlying policy of restricting women to certain duties. (A. 547) Furthermore, women appointed to the Department after the Police Officer title was officially instituted, continued to be issued identification cards bearing the denomination "Police Woman." (A. 536)

The defendants' hiring practices were merely a part of their policy of restricting women's employment opportunities. The defendants excluded women from the vast majority of the qualifying examinations for employment with the Department. The defendants gave women only two opportunities--examinations given in 1964 and 1969--to qualify for uniformed police jobs. In that same five-year period, defendants gave nineteen qualifying examinations open to men. Consequently, a male who became interested in joining the Police Department in, for example, 1965 and 1966, was able almost immediately to take an examination and be appointed. But a women who became interested at the

same time was forced to wait until 1969 to take an exam, and was not appointed until 1973. She was thus not only barred from the job assignments available to her male counterpart, but also barred from several years of employment.

From these segregated examinations, defendants established segregated ranked lists from which appointments were to be made. Although these examinations were administered prior to the effective date of Title VII as to this employer, March 24, 1972, defendants continued after that date to use the segregated lists as the sole source of appointments. Appointments from those segregated lists continued to be made until a freeze was instituted in October 1974. In 1973, appointments were made from only one all-female list, and from nine all-male lists, resulting in the appointment of vastly more men than women. In 1973, more than 2300 men, but only 478 women were appointed, while during the entire period of hiring (January 1973 through September 1974) only 513 of the 4,749 appointments were women.^{17/}

^{17/} The continued use of sex-segregated lists by itself operated to discriminate against women. The relatively small number of women who had been allowed to take the examination for the limited number of positions available to women had to compete with the vastly greater number of men who were allowed to take patrolman examinations. Furthermore, other women who may have desired [footnote continued]

Thus, defendants consistently treated its male and female employees and applicants as separate categories for the purposes of hiring and job assignments. But when New York's fiscal crisis required the layoff of a large number of employees, the defendants treated them as one category rather than two categories. Although the vast majority of the men and women hired by the Police Department had been appointed from segregated lists and assigned to different positions and different duties according to their sex, the defendants chose to treat all men

[footnote continued]

17/ patrolmen positions were not allowed to compete at all until the existing male lists were exhausted.

The continued use of lists maintained separately for female jobs and male jobs for making appointments to the Department in itself gives rise to a Title VII violation. Franks v. Bowman Transportation Co., 424 U.S. 747, 759 n.15 (1976), quoting with approval from the 1964 legislative history of Title VII: "where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held as unlawful subterfuge to accomplish discrimination." Indeed, even if defendants' post-Act maintaining of sex-segregated waiting lists and appointing from them were not viewed as explicit sex-based discrimination, but rather as a neutral practice which perpetuated the effects of the prior discriminatory exclusion of women from the bulk of the tests, the practice of appointing from those lists would violate Title VII because it disproportionately disadvantaged women. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). Teamsters made clear that post-Act perpetuation of the effects of pre-Act discriminatory practices violates Title VII except when explicitly immunized by Congress, as was the operation of bona fide seniority systems. 97 S.Ct. at 1862; United States v. Trucking Employers, Inc., ___ F.2d ___ 15 FEP Cases 232, 236 (D.C. Cir. 1977).

and women as holding the "same position"^{18/} For the purpose of determining the order of their seniority. This method--merging the seniority of the male and female employees for determining the order of layoff--resulted in the layoff of a far greater number of women than the alternative method of laying off separately in the separate male and female job categories. In other words, the defendants implemented a manner of laying off which operated to reduce drastically the number of women who would perform as patrolmen.

Each of these employment practices may be viewed as part of a policy of limiting the opportunities of women to serve as patrolmen. Defendants' segregated hiring and testing practices were explicitly designed to implement their strict segregation of women from such positions which clearly continued until 1973. Plaintiffs have introduced evidence that the defendants, through a variety of practices, have continued to attempt to impede women from serving in such positions on the

^{18/} Section 80(1) of the Civil Service Law provides that layoffs be made "among incumbents holding the same or similar positions...in the inverse order of original appointment."

same basis as men until at least 1976. Both the defendants' continued use after 1973 of sex-segregated appointment lists, and their manner of implementing the layoffs, had the clearly foreseeable effect of restricting the number of women who would have the opportunity to serve as patrolmen. The plaintiffs must be allowed to prove that each of these practices was part of the same policy. See Oubichon v. North American Rockwell Corp., 482 F.2d 569, 571 (9th Cir. 1973). If they do so, as long as any part of this course of conduct occurred within the 300 days preceding filing of the charge, the entire course of conduct is properly before the court and plaintiffs may obtain relief for injuries that resulted therefrom, regardless of whether they occurred within the charge-filing period. Two of the practices which plaintiffs challenge were clearly within 300 days of the Acha and Egan charges: the decision in early 1975 to use one merged seniority list for establishing the order of layoffs (as well as its application in the June 1975 layoffs), and the obstacles to serving as patrolmen that the Department was allegedly creating for women or as recently as 1976. Therefore, if these practices are all part of the same policy, plaintiffs may obtain relief for all of them,

including the hiring practices. Accordingly, their ability to obtain relief from the hiring violations cannot be made to depend on their proof of an incident of hiring discrimination occurring within 300 days of the charge, as the district court apparently has held.

II. BECAUSE THE POLICE DEPARTMENT'S PRE-1972 CONDUCT WAS APPARENTLY IN CLEAR VIOLATION OF 42 U.S.C. §1983, THE DISTRICT COURT SHOULD NOT HAVE LIMITED THE RELIEF WHICH PLAINTIFFS MAY OBTAIN TO INJURIES OCCURRING AFTER 1972.

Although the district court has reserved resolution of plaintiffs' claims under 42 U.S.C. §1983, it has stated that plaintiffs cannot recover relief under Title VII for injuries occurring prior to 1972. Furthermore, the Court has also stated that, under §1983: "Since this action was filed on June 26, 1975, any discriminatory acts within the preceding three years would be actionable." (A. 596) The district court then apparently limited relief under §1983 to "class members not hired until after June 1972" (Id).

The district court reserved ruling on the §1983 claims principally in order to permit the defendants to attempt to establish a justification for their practice of refusing to allow women to serve as patrolmen solely and explicitly because of their sex. (A. 598-599). But, under applicable legal principles, it seems clear that defendants can establish no such

justification, and, consequently, that their policy excluding women from such positions--and the segregated testing and appointment practices through which it was implemented--was clearly unlawful under §1983.

Since these practices were so apparently unlawful, the district court should not have restricted plaintiffs' recovery to 1972. Because Teamsters apparently limited relief under Title VII to the effective date of the 1964 Act only because the conduct at issue was not unlawful prior to that time, it does not preclude the plaintiffs in this case from recovering relief for conduct occurring before 1972 which was unlawful at the time it occurred.

It can hardly be disputed that an absolute exclusion of women from most of the routine law enforcement functions performed by male police officers, and the concomitant exclusion of women from the relevant examinations, simply because they are women, violated §1983. The Supreme Court has repeatedly condemned distinctions made between men and women which are based on "'archaic and overbroad' generalizations,"

"old notions," and "role typing." Califano v. Goldfarb,
__U.S.__, 97 S.Ct. 1021, 1026-27 (1977), and cases cited
therein. Since the only reasons for the exclusion of
women defendants could present are traditional concepts
regarding the appropriate role of women in law enforce-
ment activities,^{19/} the defendants' hiring practices--
and the resulting delayed appointments--must fall.
Cf. Dothard v. Rawlinson, __U.S.__, 97 S.Ct. 2720 (1977).

^{19/} See, e.g., affidavit of Michael J. Codd, Police
Commissioner of the City of New York (A. 269-270):

"5. Prior to 1973, it was the overwhelming
consensus of the law enforcement agencies
throughout the country that the position of
police officer was peculiarly suited solely
to males. Indeed, many departments employed
no females, and of those that did, the functions
of policewomen were limited to very specialized
tasks. Usually, these assignments concerned
the preservation of generally accepted standards
of decency in connection with the treatment of
apprehended females and juveniles, and to under-
take specialized investigative assignments re-
quiring the use of females. These functions are
generally provided for in Section 434a-2.0 of
the New York City Administrative Code.

6. In the City of New York, the needs of the
Police Department with respect to the number
of female police officers had been established
through many years of experience under the
traditional concept of a male police force."

The district court's assertion that plaintiffs must show not only a lack of substantial justification for treating women differently than men but also a discriminatory purpose as a motivating factor for defendants' actions (A. 599-600) is puzzling. The two cases relied on by the district court, Washington v. Davis, 426 U.S. 229 (1976), and Village of Arlington Heights v. Metropolitan Housing Development, ___U.S.____, 97 S.Ct. 555 (1977), require the proving of discriminatory purpose as a motivating factor only in cases in which plaintiffs allege that facially neutral practices have a disproportionate impact on a protected class. Here, most of the practices challenged--the sex-segregated exams, lists, appointments and jobs--are based on explicit sex-based distinctions. Where practices are explicitly based on sex or race distinctions, the discriminatory intent has been proved. In short, there is no serious question that defendants' sex-segregationist practices violated §1983.

^{20/} Furthermore, plaintiffs' challenge to the defendants' policy of absolutely prohibiting women from serving as

(Continued)

Teamsters does not preclude plaintiffs from recovering relief under Title VII for unlawful conduct occurring prior to 1972. The Supreme Court's statement in Teamsters on which the district court relied, that "no person may be given retroactive seniority to a date earlier than the effective date of the Act" (97 S.Ct. at 1865), must be read in the context of the particular facts of that case and the reasoning of the entire opinion. The defendant in Teamsters was a private employer, rather than a public employer. As a private employer, its actions prior to the effective date of Title VII were lawful, although they may have disadvantaged minorities or women. Therefore the seniority status of employees acquired prior to the effective date of the Act was lawfully obtained.

20/ (Footnote continued)

patrolmen was clearly timely under §1983. As noted above, (p.31,n.17) plaintiffs properly challenge as unlawful all aspects of that policy, including their conduct in making appointments from lists maintained on the basis of the applicants' sex. That conduct was itself unlawful. Women were restricted from equal access to jobs because their place in the appointment process was determined by their sex. This use of sex-segregated lists, based on sex-segregated and sex restricted examinations, clearly continued until after June 25, 1972.

The Supreme Court read the legislative history of the 1964 Act, particularly that of Section 703(h), as demonstrating a congressional intent to protect seniority rights acquired through the operation of lawful, albeit, discriminatory, practices. 97 S.Ct. at 1862-64. It summarized its view as follows:

"Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees." Id. at 1864 (footnote omitted).

Because any pre-Act action of the private employer which discriminatorily diminished an employee's seniority status was not unlawful, the Supreme Court apparently believed it improper to award seniority antedating the effective date of the Act to post-Act discriminatees. The situation is different here because defendants are not private, but public, employers, whose pre-1972 conduct, as indicated above, was clearly unlawful under §1983 at the time it occurred. The legislative history of the Equal Employment Opportunity Act of 1972, which extended Title VII to state and local governments, indicates

the clear congressional intent to supplement the^{21/}
existing rights and remedies of public employees.

The House and Senate Reports explain that, although employment discrimination by public employers was already unlawful, public employees needed the protection of more accessible administrative remedies. Title VII was meant, therefore, to create an additional remedy to redress discrimination that was already unlawful. House Report No 92-238, 92d Cong., 1st Sess. at 17-19 (1971); Senate Report No 92-415, 92d Cong., 1st Sess. at 9-11 (1971). In light of these expressions of intent to expand the remedies available to public employees, it cannot be presumed that Congress intended the courts to ignore the unlawfulness of a public employer's prior conduct and sanctioned the withholding of remedial seniority for unlawful acts occurring before March 24, 1972.

^{21/} In Teamsters, the court felt free to disregard the 1972 legislative history because the suit involved a private employer subject to the 1964 Act. 97 S.Ct. at 1864 n. 39. But since the 1972 legislation first created the right of public employees to pursue Title VII remedies, it cannot be ignored here.

Since Teamsters suggests that seniority relief antedating March 24, 1972, may be available to public employees when the defendants' pre-1972 practices violated §1983, the district court should not have categorically stated that under no circumstances could plaintiffs recover relief under Title VII prior to that date.

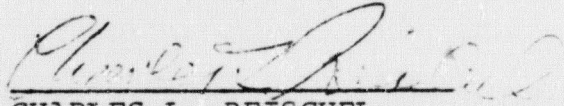
CONCLUSION

For all the reasons given above, we respectfully request that the restrictions which the district court has placed on plaintiffs' ability to obtain relief for injuries suffered because of defendants hiring practices - i.e., the requirement that they prove an incident of hiring discrimination within 300 days of the relevant charge, and the preclusion of relief for pre-1972 injuries - should not be affirmed.

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